

**IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA**

STATE OF OKLAHOMA, ex rel, W.A. DREW
EDMONDSON, in his capacity as ATTORNEY
GENERAL OF THE STATE OF OKLAHOMA,
et al.,

Plaintiff,

v.

TYSON FOODS, INC., et al.,

Defendants.

Case No. 4:05-CV-329-JOE-SAJ

**DEFENDANT TYSON FOODS, INC.’S RESPONSE IN OPPOSITION TO
STATE OF OKLAHOMA’S MOTION FOR LEAVE TO FILE A
SUPPLEMENTAL BRIEF IN OPPOSITION TO “TYSON FOODS, INC.’S
MOTION TO DISMISS COUNTS 4-10 OF THE FIRST AMENDED COMPLAINT”**

COMES NOW Defendant Tyson Foods, Inc. (“Tyson Foods”), joined by Tyson Poultry, Inc., Tyson Chicken, Inc., and Cobb-Vantress, Inc. (collectively, the “Tyson Defendants”), by and through its attorneys, and submits the following response in opposition to the State of Oklahoma’s *Motion for Leave to File a Supplemental Brief in Opposition to “Tyson Foods, Inc.’s Motion to Dismiss Counts 4-10 of the First Amended Complaint”* (“*Motion for Leave*”) (Docket No. 164). The Tyson Defendants respectfully request that this Court deny Plaintiff’s *Motion for Leave* because it is without merit and because supplemental briefing will not assist this Court in understanding or resolving the issues presented by Tyson Foods’ *Motion to Dismiss*. However, should this Court grant Plaintiff’s leave to file its proposed “Supplemental Brief,” the Tyson Defendants respectfully request that this Court likewise grant them leave to file a final brief addressing new matters, inconsistencies, and/or erroneous statements contained in Plaintiff’s “Supplemental Brief.”

ARGUMENTS AND AUTHORITIES

A. **This Court Should Deny Plaintiff’s *Motion for Leave* Because Plaintiff’s Proposed “Supplemental Brief” Will Not Assist This Court in Understanding or Resolving the Issues Before It.**

The Federal Rules of Civil Procedure (the “Federal Rules”) do not contemplate an open-ended briefing schedule whereby a party is afforded multiple opportunities to refine and reformulate arguments made in support of its position. In motion practice, district courts generally consider a matter to be fully briefed after the filing of a motion, response, and reply. *See, e.g.,* LCvR7.1(h). The Northern District adheres to these standard limitations by discouraging supplemental briefs and allowing parties to file supplemental materials only upon motion and leave of Court. *See id.* According to Plaintiff, the “fundamental issue” presented by a party’s motion for leave to file an additional brief is “whether the supplemental brief assists the Court in understanding and resolving the issues before it.” *See State of Oklahoma’s Reply Brief in Support of its Motion for Leave to File a Supplemental Brief in Opposition to Peterson Farms, Inc.’s Motion to Dismiss and Alternative Motion to Stay the Proceedings* (Docket No. 171) at 3. Assuming the correctness of this standard, Plaintiff’s *Motion for Leave* should be denied.

Upon the filing of the *Reply Memorandum of Tyson Foods, Inc. in Support of its Motion to Dismiss Counts 4-10 of the First Amended Complaint* (“Tyson Foods’ Reply”) (Docket No. 144), the issues presented by Tyson Foods’ *Motion to Dismiss* were fully briefed by the Parties, and the matter became ripe for ruling by this Court. *See* LCvR7.1(h). Nonetheless, Plaintiff now requests permission to file a “Supplemental Brief” under the guise of seeking to “clarify and correct the record” as to certain of Tyson Foods’ “legal contentions” and “factual characterizations of the State’s positions.” Plaintiff’s *Motion for Leave* at 1 (Docket No. 164). This Court should deny Plaintiff’s *Motion for Leave* because it does not “clarify” or “correct”

anything in the record and is, in fact, nothing more than Plaintiff's attempt to have "the final word" by rehashing or restating the arguments contained in Plaintiff's *Response* to Tyson Foods' *Motion to Dismiss*.

Tyson Foods' *Reply* brief complied with this Court's Local Rules by addressing only new matters contained in Plaintiff's *Response* to Tyson Foods' *Motion to Dismiss*. See LCvR7.1(h). Therefore, Plaintiff's only argument in support of its *Motion for Leave* is its general disagreement with certain "legal contentions" and "factual characterizations" made by Tyson Foods in support of Tyson Foods' propositions that: (1) the Clean Water Act preempts Oklahoma state law on claims of interstate water pollution from both point and nonpoint sources; (2) Oklahoma's claims are unconstitutional because: (a) regulation of commerce in another State violates the Commerce Clause; and (b) Due Process prevents Oklahoma from punishing conduct that is lawful in Arkansas; (3) Oklahoma's attempt to extraterritorially apply Oklahoma law in Arkansas violates the sovereignty of Arkansas; and (4) Oklahoma's federal common law nuisance claim has been displaced by the Clean Water Act. See Tyson Foods' *Motion to Dismiss* and *Reply* (Docket Nos. 66 and 144, respectively).

Under the pretext of attempting to assist this Court with its deliberations, Plaintiff's proposed "Supplemental Brief" contains Plaintiff's "legal contentions" regarding: (1) the merits of Tyson Foods' arguments for dismissal; and (2) the proper interpretation of authorities cited in Tyson Foods' briefs.¹ Plaintiff's proposed "Supplemental Brief" simply restates the arguments

¹ The Tyson Defendants note that many of the Plaintiff's "legal contentions" are incorrect and rest upon Plaintiff's fundamental misreading of authorities, *e.g.*, (1) Plaintiff has no support for its contention that *Int'l Paper Co. v. Ouellette*, 479 U.S. 481 (1987) held that federal schemes must be "mandatory" to preempt State law claims. (see Plaintiff's "Supplemental Brief" at 2, 4, 6, and 8.); (2) Plaintiff fails to distinguish between the separate concepts of preemption of State law under the Supremacy Clause, U.S. Const., Art. VI, and displacement of federal common law under the doctrine of separation of powers. (see Plaintiff's "Supplemental Brief" at 8, n. 7.); and

contained in Plaintiff's *Response* and adds nothing of substance to the briefs now before the Court. Therefore, this Court should deny Plaintiff's *Motion for Leave* because Plaintiff's "Supplemental Brief" will not assist this Court in understanding or resolving the issues now before it, and because it is for this Court – not Plaintiff – to decide the merits of Tyson Foods' arguments for dismissal and to interpret the authorities cited in Tyson Foods' briefs.

B. A Movant Should be Allowed to Make the Final Argument in Motion Briefing Because the Movant Bears the Burden of Persuasion in Such Matters.

Though not specifically articulated in the Federal Rules, a fundamental working tenet of the federal judicial system is that the party bearing the burden of persuasion on a particular matter is afforded an opportunity to present a final argument before the Court or a jury begins its deliberations. For example, with respect to motion practice, the Local Rules of the Northern District contemplate that a matter will be ready for decision after the movant makes its final arguments by filing its reply brief. *See* LCvR7.1(h). Tyson Foods submits that the issues raised by its *Motion to Dismiss* have been fully briefed and developed by the Parties and that the matter is ripe for decision without Plaintiff's proposed "Supplemental Brief."² *See id.* However, if this

(3) Plaintiff continues to argue for the erroneous application of a balancing test under *Pike v. Bruce Church, Inc.*, 397 U.S. 137 (1970), or, alternatively, a choice of law analysis, despite clear case law to the contrary. *See, e.g., Brown-Forman Distillers Corp. v. N. Y. State Liquor Auth.*, 476 U.S. 573, 578-79 (1986); *Pharmaceutical Research and Mfrs. of America v. Dist. of Columbia*, Civ. No. 05-2015, 2005 WL 3508662 (D. D.C. Dec. 22, 2005). Therefore, if this Court grants Plaintiff leave to address certain "legal contentions" in Tyson Foods' briefs, Tyson Foods respectfully requests that this Court grant it similar leave to address and correct Plaintiff's erroneous arguments.

² As set forth in a separate filing, while Tyson Foods welcomes the opportunity to present oral argument on its *Motion to Dismiss Counts 4-10 of the First Amended Complaint*: (1) there should be no oral argument on any matters pending before the Court prior to resolution of the Defendants' *Motion to Stay Proceedings* (Docket No. 125) in light of the case now pending before the United States Supreme Court styled *State of Arkansas v. State of Oklahoma*; and (2) in the interest of judicial economy, there may be no need for oral argument as the issues have been

Court were to grant Plaintiff leave to file its proposed “Supplemental Brief,” Tyson Foods respectfully requests that this Court provide it with an opportunity to make a final argument in support of its *Motion to Dismiss* by likewise granting Tyson Foods leave to file a final, responsive supplemental brief.

C. The Reality of “Meet and Confer” Discussions Between Counsel Relating to Plaintiff’s Request For Supplemental Briefing.

Plaintiff states that it contacted counsel for Tyson Foods and that Tyson Foods objected to the Plaintiff’s *Motion for Leave*. In reality, Mr. David Riggs, counsel for Plaintiff, contacted Stephen L. Jantzen to inquire as to whether the Tyson Defendants would oppose any effort by Plaintiff to file a surreply or other supplemental briefing relating to Tyson Foods’ *Motion to Dismiss Counts 4-10 of the First Amended Complaint* (Docket No. 66). In response, Mr. Riggs was informed Plaintiff could represent to the Court that Tyson Foods does not object to such an attempt so long as Tyson Foods was granted an opportunity to file a subsequent, responsive brief.

CONCLUSION

For the reasons stated herein, the Tyson Defendants respectfully request this Court to enter an order:

- (1) denying the Plaintiff’s *Motion for Leave*; or
- (2) alternatively, granting Tyson Foods leave to file a final, responsive brief to Plaintiff’s “Supplemental Brief” in the event Plaintiff’s *Motion for Leave* is granted; and
- (3) granting the Tyson Defendants such other and further relief as the Court deems just and proper under the circumstances.

fully developed by the Parties’ respective briefs. *See Defendants’ Response to the State of Oklahoma’s Request for Oral Argument on Defendants’ Motions to Dismiss* (Docket No. 175).

Respectfully submitted,

/s/ Stephen L. Jantzen

Patrick M. Ryan, OBA # 7864
Stephen L. Jantzen, OBA # 16247
Paula M. Buchwald, OBA # 20464
RYAN, WHALEY & COLDIRON, P.C.
900 Robinson Renaissance
119 North Robinson, Suite 900
Oklahoma City, OK 73102
(405) 239-6040 (phone)
(405) 239-6766 (fax)

Thomas C. Green, *appearing pro hac vice*
Mark D. Hopson, *appearing pro hac vice*
Timothy K. Webster, *appearing pro hac vice*
Jay T. Jorgensen, *appearing pro hac vice*
SIDLEY AUSTIN BROWN & WOOD LLP
1501 K Street, N.W.
Washington, D.C. 20005-1401
(202) 736-8000 (phone)
(202) 736-8711 (fax)

Robert W. George, OBA #18562
KUTACK ROCK LLP
The Three Sisters Building
214 West Dickson Street
Fayetteville, AR 72701-5221
(479) 973-4200 (phone)
(479) 973-0007 (fax)

***Attorneys for Tyson Foods, Inc., Tyson Poultry, Inc., Tyson Chicken, Inc.
and Cobb-Vantress, Inc.***

CERTIFICATE OF SERVICE

I hereby certify that on this 3rd day of January, 2006, I electronically transmitted the foregoing document to the Clerk of the Court using the ECF System for filing and transmittal of a Notice of Electronic Filing to the following ECF registrants:

W. A. Drew Edmondson
OFFICE OF ATTORNEY GENERAL
State of Oklahoma
2300 N. Lincoln Blvd, Suite 112
Oklahoma City, OK 73105
ATTORNEY FOR PLAINTIFF

David Phillip Page
James Randall Miller
Louis Werner Bullock
MILLER KEFFER & BULLOCK
222 S KENOSHA
TULSA, OK 74120-2421
ATTORNEYS FOR PLAINTIFF

Douglas Allen Wilson
Melvin David Riggs
Richard T. Garren
Sharon K. Weaver
RIGGS ABNEY NEAL TURPEN
ORBISON & LEWIS
502 W 6th St
Tulsa, OK 74119-1010
ATTORNEYS FOR PLAINTIFF

Robert Allen Nance
Dorothy Sharon Gentry
RIGGS ABNEY NEAL TURPEN
ORBISON & LEWIS
5801 N Broadway
Ste 101
Oklahoma City, OK 73118
ATTORNEYS FOR PLAINTIFF

A. Scott McDaniel
Chris A. Paul
Nicole M. Longwell
Philip D. Hixon
Martin A. Brown
JOYCE, PAUL & MCDANIEL, P.C.
1717 South Boulder Ave., Ste 200
Tulsa, OK 74119
**ATTORNEYS FOR PETERSON
FARMS, INC.**

Theresa Noble Hill
John H. Tucker
RHODES, HIERONYMUS, JONES,
TUCKER & GABLE
POB 21100
100 W. 5th Street, Suite 400
Tulsa, OK 74121-1100
**ATTORNEYS FOR CARGILL, INC.,
and CARGILL TURKEY
PRODUCTION, INC.**

R. Thomas Lay, Esq.
KERR, IRVINE, RHODES &
ABLES
201 Robert S. Kerr Ave., Suite 600
Oklahoma City, OK 73102
**ATTORNEYS FOR WILLOW
BROOK FOODS, INC.**

and I further certify that a true and correct copy of the above and foregoing will be mailed via regular mail through the United States Postal Service, postage properly paid, on the following who are not registered participants of the ECF System:

William H. Narwold
MOTLEY RICE LLC
20 Church St., 17th Floor
Hartford, CT 06103
ATTORNEYS FOR PLAINTIFF

Elizabeth C Ward
Frederick C. Baker
MOTLEY RICE LLC
28 Bridgeside Blvd
Mount Pleasant, SC 29464
ATTORNEYS FOR PLAINTIFF

C. Miles Tolbert
**SECRETARY OF THE
ENVIRONMENT**
State of Oklahoma
3800 North Classen
Oklahoma City, OK 73118

/s/ Stephen L. Jantzen
STEPHEN L. JANTZEN